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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/710,845	08/06/2004	David G. Koch	YORK.US.2	4844
24111 7590 10/19/2007 MESMER & DELEAULT, PLLC 1 NEW HAMPSHIRE AVE. SUITE 125 PORTSMOUTH, NH 03801			EXAMINER BARTOSIK, ANTHONY N	
			ART UNIT	PAPER NUMBER
			3635	
			NOTIFICATION DATE	DELIVERY MODE
			10/19/2007	ELECTRONIC

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

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<b>Office Action Summary</b>	<b>Application No.</b> 10/710,845	<b>Applicant(s)</b> KOCH ET AL.	
	<b>Examiner</b> Anthony N. Bartosik	<b>Art Unit</b> 3635	

**-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 06 August 2004.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-24 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-24 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☒ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on August 6, 2004 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a) ☐ All    b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)  | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)   | 5) <input type="checkbox"/> Notice of Informal Patent Application                       |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date <u>8/6/2004, 8/25/2005</u> . | 6) <input type="checkbox"/> Other: _____  |

**DETAILED ACTION*****Priority***

1. It is noted that this application appears to claim subject matter disclosed in prior Application No. 60/481,191, filed 08/07/2003. A reference to the prior application must be inserted as the first sentence(s) of the specification of this application or in an application data sheet (37 CFR 1.76), if applicant intends to rely on the filing date of the prior application under 35 U.S.C. 119(e), 120, 121, or 365(c). See 37 CFR 1.78(a). For benefit claims under 35 U.S.C. 120, 121, or 365(c), the reference must include the relationship (i.e., continuation, divisional, or continuation-in-part) of all nonprovisional applications. If the application is a utility or plant application filed under 35 U.S.C. 111(a) on or after November 29, 2000, the specific reference to the prior application must be submitted during the pendency of the application and within the later of four months from the actual filing date of the application or sixteen months from the filing date of the prior application. If the application is a utility or plant application which entered the national stage from an international application filed on or after November 29, 2000, after compliance with 35 U.S.C. 371, the specific reference must be submitted during the pendency of the application and within the later of four months from the date on which the national stage commenced under 35 U.S.C. 371(b) or (f) or sixteen months from the filing date of the prior application. See 37 CFR 1.78(a)(2)(ii) and (a)(5)(ii). This time period is not extendable and a failure to submit the reference required by 35 U.S.C. 119(e) and/or 120, where applicable, within this time period is considered a waiver of any benefit of such

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prior application(s) under 35 U.S.C. 119(e), 120, 121 and 365(c). A benefit claim filed after the required time period may be accepted if it is accompanied by a grantable petition to accept an unintentionally delayed benefit claim under 35 U.S.C. 119(e), 120, 121 and 365(c). The petition must be accompanied by (1) the reference required by 35 U.S.C. 120 or 119(e) and 37 CFR 1.78(a)(2) or (a)(5) to the prior application (unless previously submitted), (2) a surcharge under 37 CFR 1.17(t), and (3) a statement that the entire delay between the date the claim was due under 37 CFR 1.78(a)(2) or (a)(5) and the date the claim was filed was unintentional. The Director may require additional information where there is a question whether the delay was unintentional. The petition should be addressed to: Mail Stop Petition, Commissioner for Patents, P.O. Box 1450, Alexandria, Virginia 22313-1450.

If the reference to the prior application was previously submitted within the time period set forth in 37 CFR 1.78(a), but not in the first sentence(s) of the specification or an application data sheet (ADS) as required by 37 CFR 1.78(a) (e.g., if the reference was submitted in an oath or declaration or the application transmittal letter), and the information concerning the benefit claim was recognized by the Office as shown by its inclusion on the first filing receipt, the petition under 37 CFR 1.78(a) and the surcharge under 37 CFR 1.17(t) are not required. Applicant is still required to submit the reference in compliance with 37 CFR 1.78(a) by filing an amendment to the first sentence(s) of the specification or an ADS. See MPEP § 201.11.

***Claim Rejections - 35 USC § 112***

2. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

3. Claim 9 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. It is unclear whether claim 9, due to its dependency on claim 8, is a further alternative method of transporting liquid and whether that method is in addition to the capillary action or fiber tow infiltration. The alternative language of claim 8 creates the indefinite language of claim 9.

***Double Patenting***

4. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

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Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

5. Claims 1-24 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-5 of U.S. Patent No. 6,696,141. Although the conflicting claims are not identical, they are not patentably distinct from each other because all of the elements of the present application are included within the claims of the issued patent.

***Claim Rejections - 35 USC § 103***

6. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

7. **Claims 1-2, 7-12, and 17-20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Cohen et al. (US 2,005,221) in view of Ruiz et al. (US 6,550,190).**

8. In Re claims 1 and 11, Figure 3 of Cohen et al. teaches a flashing membrane (10), the flashing membrane having a first side and a second side opposite the first side, a reinforcing cloth (11) adhered to the flashing membrane first side, and a cloth (11) adhered to the flashing membrane second side.

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Cohen et al. does not disclose that the cloth disposed on both sides of the flashing member is capable of wicking. Figure 7 of Ruiz et al. teaches placing a wicking cloth (30) on a first and second side of a device for wicking condensation. It therefore, would have been obvious to one skilled in the art at the time of the invention to modify the cloth of Cohen et al. by substituting it with the wicking cloth as taught by Ruiz et al. in order to wick away condensation and moisture above and below the flashing.

9. In Re claims 2 and 12, Cohen discloses a flashing membrane that is a sheet of material made of at least one taken from the group consisting of **copper**, PVC, polyethylene, and stainless steel.

10. In Re claims 7 and 17, Column 4 Lines 30-50 of Ruiz et al. discloses a wicking cloth material that is one taken from the group consisting of polyester, **polypropylene**, polypropylene nylon, and polyethylene.

11. In Re claims 8 and 18, Ruiz et al. discloses a wicking cloth that transports liquid by capillary action or fiber tow infiltration.

12. In Re claims 9 and 19, Ruiz et al. discloses a wicking cloth that also transports liquid by gravity.



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13. In Re claims 10 and 20, Cohen et al. discloses an adhesive (13) disposed between the reinforcing cloth (11) and the flashing membrane (10), and between the wicking cloth (11) and the flashing membrane (10).

**14. Claims 21-24 are rejected under 35 U.S.C. 103(a) as being unpatentable over Surlis (US 6,023,892), in view of Cohen et al. (US 2,005,221) and Ruiz et al. (US 6,550,190).**

15. In Re claims 21 and 24, Figure 1 of Surlis Figure 3 teaches an inner wall, an outer wall, and a combination through-wall masonry flashing and drainage device, the device having a first edge and a second edge opposite the first edge, wherein the first edge of the device is secured to the inner wall with the wicking cloth facing up, and the second edge of the device is secured beyond the outer wall, such that water between the inner wall and outer wall is drawn through a mortar joint at the base of the outer wall to the outside of the outer wall by the wicking action of the wicking cloth without the need for vents. Surlis teaches a wicking cloth, however, does not disclose the flashing having a cloth on both sides. Figure 3 of Cohen et al. teaches a flashing membrane (10), the flashing membrane having a first side and a second side opposite the first side, a reinforcing cloth (11) adhered to the flashing membrane first side, and a cloth (11) adhered to the flashing membrane second side. Cohen et al. does not disclose that the cloth disposed on both sides of the flashing member is capable of wicking. Figure 7 of Ruiz et al. teaches placing a wicking cloth (30) on a first



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and second side of a device for wicking condensation. It therefore, would have been obvious to one skilled in the art at the time of the invention to modify the drainage system of Sourlis with the flashing structure as taught by Cohen et al. and additionally substituting the cloth of Cohen et al. with the wicking cloth as taught by Ruiz et al. in order to wick away condensation and moisture above and below the flashing.

16. In Re claim 22, Figure 1 of Sourlis discloses a first edge that is secured at a higher elevation on the inner wall than the second edge is secured to the outer wall.

17. In Re claim 23, Figure 1 of Sourlis discloses a horizontal concrete support (40) upon which the inner wall and outer wall are supported, wherein the device second edge is disposed between and beyond the outer wall and concrete support.

**18. Claims 3, 5, 13, and 15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Cohen et al. (US 2,005,221).**

19. In Re claims 3 and 5, Cohen et al. discloses the basic claim structure of the instant application but does not disclose specific dimensions. Applicant fails to show criticality for specifically claimed dimensions, therefore it would have

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been an obvious design choice to use the dimensions such as specified in these claims.

20. In Re claims 13 and 15, Cohen et al. discloses the basic claim structure of the instant application but does not disclose specific weights. Applicant fails to show criticality for specifically claimed weights, therefore it would have been an obvious design choice to use the dimensions such as specified in these claims.

**21. Claims 4 and 14 are rejected under 35 U.S.C. 103(a) as being unpatentable over Cohen et al. (US 2,005,221) in view of Maisotesenko et al. (US 6,581,402).**

22. In Re claims 4 and 14, Cohen et al. teaches the claimed invention except that the wicking cloth be made from fiberglass. The Abstract of Maisotesenko et al. teaches that it is well known to make a wicking cloth from fiberglass. It would have been obvious to one skilled in the art at the time of the invention to make the wicking cloth of Cohen et al. from fiberglass as taught by Maisotesenko et al.

### ***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Anthony N. Bartosik whose telephone number is 571-270-3112. The examiner can normally be reached on M-F 7:30-5:00; E.D.T.

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Richard Chilcot can be reached on 571-272-6777. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.



Richard Chilcot  
Supervisory Patent Examiner  
Art Unit 3635

AB  
10/2007